UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KMAC, INC. AND ACOUSTICAL SOUND FLOORS, INC., Alter Egos and a Single Employer and CONSTRUCTION AND GENERAL LABORERS LOCAL563	NLRB Case 18-CA-185912 **RESPONDENTS' BRIEF IN SUPPORT OF SUMMARY JUDGMENT**

KMAC, Inc. ("KMAC") and Acoustical Sound Floors, Inc. ("Acoustical") (collectively referred to as "Respondents"), by and through their attorneys Seaton, Peters & Revnew, P.A., and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Section 102.24 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), hereby submit the following Brief in Support of their Motion for Summary Judgment.

I. INTRODUCTION

The issue in this matter is substantially identical to the issue which was subject to a grievance and arbitration proceeding between the parties: whether Respondents in this matter operated as alter egos and/or a single employer in contravention of the collective bargaining agreement with the Union. The Arbitrator issued an Award finding merit to the grievances. This Award meets, to the letter, the criteria established by the Board for deferral to arbitration awards, and such deferral should be granted. Alternatively, should the Board decline to defer to the Award, the Complaint should nonetheless be dismissed as based on charges filed outside the 10(b) period.

II. BACKGROUND AND UNDISPUTED FACTS

A. The Grievances and Arbitration Award.

On June 8, 2016, Construction and General Laborers Local No. 563 ("Union") filed a grievance against KMAC, alleging "KMAC is not using bargaining-unit members to do bargaining unit work and, moreover, is paying those employees less than the contract-required rate of wages and benefits to do that bargaining unit work." (Ex. 1). Subsequently, on December 22, 2016, the Union filed a second grievance, alleging:

> KMAC, Inc. and Accoustical Sound Floors, Inc. have common ownership and financial control, the same operating address, office building and staff, policies and procedures, management, field employees, vehicles, equipment, and tools, centralized labor relations, and interrelated operations in all other relevant respects. Nonetheless, when Accoustical Sound Floors, Inc. issues paychecks to KMAC, Inc. employees for doing Contract-covered work, the Contract-required wages and benefits are not paid and the Contract-required dues/agency monies are not withheld from employee paychecks or conveyed to the Union, and KMAC, Inc. is otherwise not complying fully with the Contract when performing Contract-covered work. In other words, KMAC, Inc. is using Accoustical Sound Floors, Inc. as an alter ego, joint employer, single employer, joint venture, and/or successor to operate double breasted for the purpose of avoiding KMAC, Inc.'s legal obligations under the Contract. By its conduct, KMAC, Inc. has also repudiated the Contract and, therefore, the collective bargaining relationship with the Union.

(Ex. 2).

Arbitrator Jay C. Fogelberg conducted a hearing to consider the grievances on February 13, 2018, and May 16, 2018. He subsequently issued an award on August 7, 2018, finding merit to the grievances. (Ex. 3). He ordered that monetary damages be calculated from May 1, 2016, and be limited to work performed in the nine-county jurisdiction of the CBA excluding residential and single family projects. (Ex. 3, pp. 17-19).

B. The Unfair Labor Practice Charge and Complaint.

The Union also filed the unfair labor practice charge in this matter on October 11, 2016. (Ex. 4). The Charge alleged:

> Within the past 6 months, the Employer has failed to bargain in good faith by refusing to comply fully with Union information requests duly served on the Employer to process the pending grievance and otherwise to enforce the governing collective bargaining agreement ("CBA"). The Employer has also failed to bargain in good faith by, for example, unilaterally changing terms of the CBA by, among other means, subcontracting bargaining-unit work to a non-union signatory and paying less than the contract-required wages and benefits for the performance of contract-covered work.

The Union then filed an amended charge on December 21, 2016, alleging as follows:

> Within the past 6 months, the Employer has repudiated the collective bargaining agreement ("CBA") with the Union by subcontracting out bargaining-unit work and designating that work as non-union work not subject to the CBA. In addition, the Employer has filed to bargaining in good faith by, for example, unilaterally changing terms of the CBA by, among other means, subcontracting bargaining-unit work to a non-union contractor and paying less than the CBA-required wages and benefits for the performance of CBA-covered work. By its conduct, the Employer has also evaded its obligations under the CBA by operating double-breasted as a single employer, joint employer, and/or alter ego with a non-union contractor.

(Ex. 5).

The Regional Director for Region 18 issued a Complaint based on the Charges on March 29, 2018. (Ex. 6). The Complaint alleges, in pertinent part, as follows:

> 4. In about December 2007, Respondent Acoustical was established by Respondent KMAC as a disguised continuation of Respondent KMAC.
>
> 5. Respondent KMAC established Respondent Acoustical, as described above in paragraph 4, for the purpose of evading its responsibilities under the Act.
>
> . . .
>
> 15. Since at least 2016, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representatives of the employees in the Unit employed by Respondent Acoustical.

> 16. Since at least 2016, Respondent has failed and refused to apply the terms of its collective bargaining agreement referred to in paragraph 13 to its Unit employees employed by Respondent Acoustical including but not limited to failing/refusing to make contractual wage and fringe benefit allocations.
> . . .
>
> 19. Since at least 2016, Respondent has not honored and has repudiated the collective bargaining agreement described above in paragraph 13 for its Unit employees employed by Respondent Acoustical.
>
> 20. By the acts and conduct described above in paragraphs 4, 5, 15, 16, 18, and 19, Respondent has failed and refused to bargain collectively and in good faith with the representative of its employees, and Respondent thereby had been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

(*Id.*).

III. ARGUMENT

A. The Board Should Defer to the Arbitrator's Award.

The Board should defer to Arbitrator Fogelberg's Award and dismiss the Complaint. The Board defers to an arbitration award, with respect to alleged violations of Section 8(a)(5) of the Act[1], when:

> . . . the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). An **arbitration award** is "clearly repugnant" only if it is "palpably wrong" and "not susceptible to an interpretation consistent with the Act." *Olin Corp.*, 268 NLRB 573, 574 (1984). Additionally, the arbitrator must have considered the unfair labor practice issue that is before the Board. The arbitrator has adequately considered the unfair labor practice issue if "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." *Id.* The party opposing **deferral** bears the burden of proof. *Id.*

Weavexx, LLC, 362 NLRB No. 141, p. 2 (2016).

[1] The standard for deferral of allegations Section 8(a)(3) and (1) violations set forth in *Wilcox and Babcock Construction Co.*,361 NLRB No. 132 (2014), is inapplicable to allegations of Section 8(a)(5) violations. *Id.* at fn. 2.

In *Weavexx*, the Board reversed an administrative law judge's refusal to defer to an arbitration award. In that case, the employer unilaterally changed its payday and pay cycle without providing the Union notice or an opportunity to bargain over the decision. *Id.* at 1. Employees then filed multiple grievances over the change, and the Union filed a charge alleging violations of Section 8(a)(5) and (1) of the Act. *Id.* An arbitrator subsequently denied the grievance, discussing the management rights clause, and concluding that the "Company's use of managerial discretion was proper and should not be seen as a violation of binding past practice." *Id.* at 3.

The ALJ refused to defer to the award, finding it repugnant to the Act, and also because a statutory issue alleged in the complaint, the change in payday, was not presented to the arbitrator. The Board reversed, finding that first that it was undisputed that the arbitration proceedings were fair and regular, and that all parties had agreed to be bound to the award. The Board then discussed the standard for determining whether an arbitration award is repugnant to the Act, stating that:

> deferral is appropriate where one interpretation of the arbitrator's decision is consistent with the Act, even if the Board would not necessarily reach the same result. *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659-660 (2005). In *Smurfit-Stone*, the Board deferred to an arbitrator's decision where a reasonable interpretation of the decision was that the employer was privileged to implement unilateral changes based on the management-rights clause contained in the parties' collective-bargaining agreement. *Id.* at 659. The Board reasoned: "(1) the [r]espondent argued to the arbitrator that the management-rights clause privileged it to unilaterally implement the new attendance control policy; (2) the arbitrator referred to the [r]espondent's argument; (3) the arbitrator prominently quoted the management-rights clause; and (4) the arbitrator immediately followed his quotation of the management-rights clause with the assertion that the [r]espondent had the right to make rules." *Id.* at 661. Based on these factors, the Board found that the arbitrator's decision was based on his construction of the management-rights clause and was thus susceptible to an interpretation consistent with the Act. The Board accordingly concluded that the decision was not repugnant to the Act, even though the arbitrator also discussed an inherent management prerogative theory.

Id. at 2.

Finally, the *Weavexx* Board found the arbitrator had adequately considered the unfair labor practice under the *Olin* standard, including the issue regarding the change in payday. *Id.* at 3. While the ALJ held that the issues had not been litigated at the arbitration hearing, the Board found that "the factual and statutory issues presented are identical with regard to the change in pay cycle and payday. Both changes were implemented at the same time, prompted by the same event, made in reliance on the same contractual provisions, and deviated from the same past practice. Those are exactly the facts relevant to the statutory issue in this case with respect to both changes." *Id.* The Board therefore concluded that General Counsel had "failed to meet his burden to show that the standards for deferral have not been met in this case." *Id.* at 4.

As in *Weavexx*, the Complaint in the immediate case alleges violations of Sections 8(a)(5) and (1), such that the traditional standard for deferral set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573, 574 (1984), applies, and under which the party opposing deferral bears the burden of proof.

1. The Arbitration Proceedings were Fair and Regular.

It is indisputable that the arbitration proceedings in this matter were fair and regular. As reflected in the hearing transcript, as well as the Award, all parties were given notice of the proceeding, and appeared at the hearing. Furthermore, they were given the opportunity to present witnesses, cross-examine witnesses, introduce exhibits, and fully brief their positions to the arbitrator. (Ex. 3, p. 2). These are the hallmarks of fair and regular proceedings. *See Good Samaritan Hospital*, 363 NLRB No. 186, p. 3 (2016).

2. The Parties Agreed to be Bound to the Award.

It is also undisputed that the parties' collective bargaining agreement contains an arbitration clause, which includes the following language:

> The decision of the Arbitrator shall be final and binding on the parties to this Agreement who are the parties to the dispute; provided, however, that the Arbitrator shall have no power to add to, delete, or modify any provisions of this Agreement.

(Ex. 7, Art. 11, D).

Such a provision, along with the parties' active participation in the arbitration proceeding, establishes that the parties agreed to be bound.

3. The Grievance Dispute is Factually Parallel to the Unfair Labor Practice Issue.

Under the *Olin* standard, an arbitrator need not explicitly consider the statutory issue, or the applicable legal principles, in order for the Board to exercise deferral. Rather, for purposes of determining whether the grievance dispute is factually parallel to the unfair labor practice dispute, it is sufficient that the unfair labor practice and contract disputes turn on the same findings and evidence. See *Reichhold Chemicals*, 275 1414, 1416 (1985); *Badger Meter*, 272 NLRB 824, 826 (1984).

At its core, the Complaint alleges an unlawful alter ego or single employer relationship between KMAC and Acoustical. The Complaint alleges that KMAC established Acoustical as a disguised continuation of KMAC for the purpose of evading its (KMAC's) responsibilities under the Act. (Ex. 6, para 4, 5). The Complaint further alleges:

> 3. At all material times, Respondent KMAC and Respondent Acoustical have had substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership; have been affiliated business enterprises with common premises and facilities; have administered a common labor policy; have interchanged personnel; and have held themselves out to the public as a single-integrated business enterprise with a common business purpose.

(Ex. 6, para. 3).

Further, the Complaint alleges that Respondents failed to recognize the Union as the bargaining representative of Acoustical's employees, failed to apply the terms of the labor

agreement to Acoustical employees, and thereby repudiated the labor agreement. (Ex. 6, para. 15, 16, 19).

Similarly, the issue before the Arbitrator was whether KMAC violated the Labor Agreement by "owning and operating a non-signatory company." (Ex. 3, p. 2). In considering this issue the Arbitrator explicitly applied the test utilized by the "NLRB" and courts to determine "single employer" or "alter ego" status. (Ex. 3, p. 14). Specifically, under that standard, he explicitly considered "the interaction of operations; common management of both entities; centralized or common control of labor relations, and; common ownership." (*Id.*). As such, the facts upon which the unfair labor practice allegation turns, are in fact the very same facts relied upon by the Arbitrator in deciding the grievance.

4. The Arbitrator was Presented with Facts Relevant to the Unfair Labor Practice.

Finally, not only is it clear that the unfair labor practice issue turns on the same facts as the grievance issue, but also that the Arbitrator was, in fact, actually presented with the facts relevant to the unfair labor practice allegations. In this regard the Arbitrator specifically itemized, by bullet point, the factual findings upon which he relied in issuing his award. (Ex. 3, p. 14-15). Those itemized findings virtually mirror the factual allegations of paragraph 3 of the Complaint, quoted above. As such, there is no question but that this prong of the *Olin* standard has also been met.

5. The Award is not Repugnant to the Act.

As in *Weavexx*, as well as *Smurfit-Stone*, the Arbitrator's Award here is not "palpably wrong," and indeed is subject to an interpretation which is obviously consistent with the Act. This, in particular, is true of the Arbitrator's remedy. As reflected in those cases, arbitration awards are not repugnant to the Act if they are subject to an interpretation which is consistent with the Act.

In both *Weavexx* and *Smurfit-Stone*, the awards were held to be subject to such an interpretation where they were reasonably based on contract language.

In the immediate case, the Arbitrator based both his finding of contract violations, and his directions for calculation of a remedy, directly on contract language or to admissions of the Union witnesses. With respect to the Award calculation being limited to the period since May 1, 2016, the Arbitrator directly identified the effective dates of the 2016 to 2019 Agreement. (Ex. 3, p. 18). The Arbitrator also tied the Award limitation to work in the nine county area based specifically on the language of Article 4, which establishes the contract's jurisdiction. (*Id.*, at p. 17). Finally, the exclusion of single family and residential work was based on the Union's own admission that such was not at issue. (*Id.* at 17).

Where the Award remedy is so clearly based on the contract language (or on the Union's admissions), it obviously has an interpretation which is consistent with the Act. At the very least, it is undisputed that General Counsel cannot carry the burden of establishing the Award as "repugnant" to the Act.

Give the foregoing, the Board should defer to the Arbitration Award and the Complaint should be dismissed.

B. The Complaint Should be Dismissed as Untimely.

Should the Board decline to defer to the Arbitration Award, then, in the alternative, the Complaint should be dismissed as untimely. Section 10(b) of the Act provides that "no complaint shall be based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). In this case the Complaint alleges that KMAC established Acoustical in 2007 for the purpose of evading its responsibilities under the Act. (Ex.

6 para. 4, 5). Moreover, the Complaint alleges that that KMAC repudiated the bargaining agreement by not applying it to Acoustical's employees. (Ex. 6, para 19).

The Board has held that "[W]hen the alleged unfair labor practice may be characterized as a contract repudiation, the unfair labor practice occurs at the moment of repudiation, and the 10(b) period begins to run at the moment the union has a clear and unequivocal notice of that act." *St. Barnabas Medical Center*, 343 NLRB 1125, 1127 (2004). Moreover, a party has constructive notice of such "an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence." *Id.*, quoting *Moeller Brothers Body Shop*, 306 NLRB 191, 193 (1992). In *Moeller*, the Board elaborated that while a union is not required to aggressively police its contracts in order to satisfy the reasonable diligence standard, "it cannot with impunity ignore an employer or a unit . . . and then rely on its ignorance of events at the shop to argue it was not on notice of an employer's unilateral changes." *Id.*

Here, the Complaint alleges that the Respondents have engaged in the unlawful alter ego relationship since 2007, and thus for period of at least nine (9) years prior to the first charge. It simply incredulous to conclude that the Union had no prior notice of the alleged relation between KMAC and Acoustical absent an utter failure of due diligence by the Union.

Moreover, at the Arbitration hearing the Union's own witness, former KMAC employee Cole Lux, testified that he understood he was working for two companies as early as 2005, and that he complained to the Union office in Mankato in the Summer of 2013 of the resulting two pay rates. (Ex. 8, Tr. 97, 101-102). Moreover, Union witness and Business Manager Joseph Fowler testified on direct examination by Union Counsel that the Union had jurisdiction over the Mankato area at the time of Lux's Complaint. (Ex. 8, Tr. 163-164). While Fowler testified that Lux's complaint may not have been sufficient for a grievance, his complaint nonetheless provided more

than sufficient notice to trigger the Union's due diligence obligations to investigate the relationship between KMAC and Acoustical. Therefore, any current claim that the Union did not have clear notice of the alleged relationship between the Companies prior to the 2016 charges simply amplifies the Union's failure to conduct itself with reasonable diligence.

Fowler, on the second day of the arbitration hearing, which occurred three months after his original testimony, attempted to contradict himself by then claiming that Local 563 did not have jurisdiction over Mankato at the time of Lux's 2013 complaint. (Ex. 8, Tr. 357). This bald and self-serving contraction of his own testimony need not be credited. Nonetheless, he also testified on cross examination that Local 563 obtained jurisdiction over Mankato after a Spring 2014 merger. (Ex. 8, Tr. 368-69). In this regard, Local 563's LM-2 report for that period references the merger with LIUNA Local 132 (the Mankato local), and notes the transfer of Local 132 business representatives and employees to Local 563. (Ex. 9, p. 30).

As such, even if Local 563 did not have jurisdiction over Mankato in the Summer of 2013, it would have assumed the knowledge of Lux's complaint from the local union with which it merged the following Spring, as that merger would have joined the locals into a single entity, and the knowledge of transferred employees would be imputed to Local 563. *See D.L. Baker, Inc.*, 351 NLRB 515, 520 (2007)(knowledge of a predecessor's ULP is imputed to a successor where successor hired the predecessor's manager). In either case, Lux's complaint clearly highlights the Union's failure to meet the standard of reasonable diligence for contract enforcement.

In sum, the Union either had knowledge of the relationship between KMAC and Acoustical prior to the 10(b) period, or utterly failed to exercise reasonable diligence in contract enforcement.

IV. CONCLUSION

Respondents request, for the forgoing reasons, that the Board grant summary judgment, deferring to the Arbitration Award and dismissing the Complaint. In the alternative, Respondents request that the Board dismiss the Complaint, as the underlying charges were filed outside the 10(b) period.

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Dated: September 12, 2018

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